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NO. 90-1502

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SAMUEL I. PRATHER,

Petitioner,

vs.

THE DAYTON POWER & LIGHT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

Was summary judgment against petitioner's complaint for damages for discriminatory discharge under 42 U.S.C. § 1981 properly issued based upon *Patterson* v. *McLean Credit Union*, 491 U.S. ____, 105 L.Ed. 2d 132, 109 S.Ct. 2363 (1989), as applied retroactively?

Did the trial court abuse its discretion by denying petitioner's motion to amend his complaint when such amendment would inject an entirely new issue on which no discovery had been conducted some six years after the event at issue?

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STATEMENT OF THE CASE

The history of this case begins on September 13, 1982, when petitioner was discharged for cutting a hose at Dayton Power and Light. He pursued a grievance through arbitration, pursuant to the collective bargaining agreement, which resulted in an arbitration hearing on June 7, 1983. Petitioner lost at arbitration. An unfavorable decision was rendered by the arbitration panel on August 18, 1983.

On February 28, 1983, petitioner filed a charge with the Ohio Civil Rights Commission (OCRC), where he ultimately prevailed. As a result of successfully asserting his charge of discrimination, petitioner was awarded reinstatement and paid back pay and benefits in the amount of $235,667.27. This important fact was omitted by petitioner in his Petition for Writ of Certiorari.

Petitioner filed suit under 42 U.S.C. § 1981, alleging discriminatory discharge. He amended his complaint on March 27, 1989, and still alleged only discriminatory discharge. In neither complaint did petitioner allege the underlying 1983 arbitration was tainted.

Although summary judgment was granted by the trial court as to the fact petitioner was improperly discharged, significant issues remained regarding whether he was entitled to any other compensatory damages since he was reinstated and paid $235,667.27, and whether he could prove that respondent's conduct entitled him to punitive damages. Respondent sought summary judgment as to these remaining issues based upon the recent Supreme Court decision of *Patterson* v. *McLean Credit Union*, 491 U.S. ____, 105 L.Ed. 2d 132, 109 S.Ct. 2363 (1989). After briefing, the court granted respondent's motion for summary judgment.

Thereafter, petitioner sought to alter or amend that decision and also sought to file a second amended complaint, alleging for the first time the 1983 arbitration was tainted. After briefing, the trial court overruled both motions. The Sixth Circuit Court of Appeals affirmed the trial court on November 14, 1990, and denied the petition for rehearing on December 28, 1990.

STATEMENT OF THE FACTS

On September 13, 1982, petitioner, Samuel Prather, was terminated for intentionally cutting a hose while at work at the Dayton Power & Light Company (DP&L). Mr. Prather knew that DP&L had a policy of discharging employees who were caught destroying property. He admitted that he lied to not only DP&L employees about cutting the hose, but also initially lied to the Ohio Civil Rights Commission about the fact he cut the hose.

Petitioner contended that DP&L terminated him not for cutting the hose, which he now admits he did, but because he was black. Although petitioner focuses upon comments made by two supervisors, Mr. Hackathorn and Mr. Mason, for this position, petitioner admitted that even though these men may have made discriminatory comments to him, they did not treat him any differently than white employees. He also admitted that he never filed any grievances or complaints with his union or the company about any alleged racial discrimination from the time he was hired in 1970 to when he was discharged in 1982.

After summary judgment was granted against petitioner, he asserted for the first time that DP&L retaliated in some manner against employees who testified at the arbitration hearing held in 1983. However, the facts establish that petitioner called as witnesses fellow employees John Feurt, Eddie Grooms, Lester Johnson, and Frank Rosselot. All of these employees testified that the company employees involved in petitioner's discharge were prejudiced. These same employees testified in the same manner before the Ohio Civil Rights Commission, and were named as witnesses again by petitioner in this action. The only witness known to have lied during any of these proceedings was petitioner himself.

Petitioner contended that retaliation was taken against Danny Doyle for testifying. However, the facts established that the company policy was to discharge employees who were caught destroying property and petitioner admitted the

first time DP&L knew Danny Doyle cut a hose was shortly before petitioner's arbitration. He further admitted that once it was known Doyle cut a hose, he was discharged, which was consistent with the company policy.

After petitioner and his witnesses testified at the arbitration, he was discharged for cutting the hose, as he eventually admitted he did. After receiving an adverse finding against him at the arbitration, he did not appeal that decision or claim that the arbitration process was tainted. Rather petitioner proceeded to the Ohio Civil Rights Commission, which resulted in an order that petitioner be reinstated with back pay. After appeal, petitioner was reinstated to his position at DP&L and paid $235,667.27 in back pay and benefits.

During the same period of time, petitioner filed suit in federal court alleging his discharge violated 42 U.S.C. § 1981. He amended the complaint on March 24, 1989, four years after filing the initial complaint. A review of the complaint and amended complaint establishes no allegations were made about alleged improprieties during the 1983 arbitration. Petitioner's deposition was also taken twice, on August 23, 1985, and March 17, 1988, during which petitioner made no mention of any such improprieties. Although petitioner submitted affidavits of various employees in support of his new allegation that the arbitration was impermissibly tainted, the affidavits were important for what was not stated. None of the employees who testified for petitioner asserted any retaliation was taken against them. Danny Doyle alleged he feared retaliation, but made no mention of threats or any specific facts to support action taken by DP&L. Petitioner's union steward, James Work, who represented petitioner in the grievance process, did not indicate any witness refused to testify for fear of retaliation. Moreover, no excuse was proffered by petitioner to justify delay of over six years before raising this claim of a tainted arbitration.

REASONS FOR DENYING THE PETITION

I. SUMMARY JUDGMENT AGAINST PETITIONER'S COMPLAINT UNDER 42 U.S.C. § 1981 FOR COMPENSATORY AND PUNITIVE DAMAGES RESULTING FROM A DISCRIMINATORY DISCHARGE WAS PROPERLY ISSUED BASED UPON *PATTERSON* v. *McLEAN CREDIT UNION*, 491 U.S. ____, 105 L.Ed. 2d 132, 109 S.Ct. 2363 (1989), AS APPLIED RETROACTIVELY, PARTICULARLY SINCE PETITIONER PREVAILED IN STATE COURT, WHERE HE WAS AWARDED $235,667.27 IN DAMAGES AND WAS REINSTATED.

Petitioner asserts that a writ of certiorari should be granted because there is a conflict between the Sixth Circuit Court of Appeals and the Eighth Circuit Court of Appeals as to whether *Patterson* v. *McLean Credit Union*, 491 U.S. ____, 105 L.Ed. 2d 132, 109 S.Ct. 2363 (1989) applies to discriminatory discharge actions brought pursuant to 42 U.S.C. § 1981. However, the case upon which petitioner relies for the conflict, *Hicks* v. *Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated*, ____ U.S. ____, 59 U.S.L.W. 3635, 55 Empl. Prac. Dec. (CCH) P40,604 (1991) was vacated by the Supreme Court and remanded to the Eighth Circuit for further consideration in light of the Eighth Circuit's *en banc* rehearing in *Taggert* v. *Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990) *rehearing en banc* (Feb. 1, 1991). The panel in *Taggert*, *supra*, disapproved of the *Hicks*, *supra*, decision. It is likely the Eighth Circuit will join with the majority of jurisdictions that have found *Patterson*, *supra*, to preclude discriminatory discharge actions under § 1981. Although, in all probability, no conflict in the law exists, respondent will address why the Sixth Circuit decision in this case was correct.

In *Patterson* v. *McLean Credit Union*, 491 U.S. ____, 105 L.Ed. 2d 132, 109 S.Ct. 2363 (1989), the United States

Supreme Court held that 42 U.S.C. § 1981 did not apply to conduct occurring after the formation of the contract and conduct that does not interfere with the right to enforce established contract obligations. The Supreme Court in *Patterson* had granted certiorari on whether a harassment and failure to promote claim were cognizable based upon 42 U.S.C. § 1981. The majority of the court interpreted § 1981 as limited to forbidding discrimination in the making and enforcement of contracts:

> The first of these protections extends only to the formation of a contract, *but not to problems that may arise later* from the conditions of continued employment. . . . *the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.* Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, *matters more naturally governed by state contract law and Title VII.*

105 L.Ed. 2d at 150-51. (Emphasis supplied.)

Since *Patterson* was not a discharge case, petitioner contends that its limitation of § 1981 actions is not applicable to discharge cases. This contention has no merit. First, the obvious intent of the Supreme Court was to limit § 1981 claims so as not to include post-contract formation claims: "Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts." *Id.* at 150. Thus, under *Patterson*, once a party has secured employment, the protection afforded by § 1981 to make a contract, is at an end. The breach of that contract is only actionable at state law or under Title VII, 42

U.S.C. § 2000 *et seq. Id.* at 150-151. The *Patterson* court condemned any interpretation that overlapping remedies be available under Title VII and § 1981 stating "[u]nnecessary overlap between Title VII and § 1981 would also serve to upset the delicate balance between employee and employer rights struck by Title VII." *Id.* at 154, n. 4. It is clear from a reading of *Patterson* that § 1981 cannot be used as a vehicle to redress a discriminatory discharge claim.

The majority of other jurisdictions confronted with the question of whether discriminatory discharge is actionable under § 1981 after *Patterson*, have held that discriminatory discharges are not actionable under § 1981. *See e.g.*, *Overby* v. *Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989) (retaliatory discharge), *Greggs* v. *Hillman Distrib. Co.*, 719 F.Supp. 592 (S.D. Tex. 1989) (discriminatory discharge); *Mathis* v. *Boeing Military Airplane Co.*, 719 F.Supp. 991 (D. Kan. 1989) (retaliatory discharge); *Rivera* v. *AT&T Info. Systems, Inc.*, 719 F.Supp. 962 (D. Colo. 1989) (discriminatory discharge), *Brackshaw* v. *Miles, Inc.*, 723 F.Supp. 60 (E.D. Ill. 1989) (forced resignation).

Petitioner attempts to avoid the application of the *Patterson* rules to this discharge case by asserting that had the Supreme Court intended to apply *Patterson* to discharge cases, it would have done so in *Jett* v. *Dallas Independent School Dist.*, 491 U.S. ____, 105 L.Ed. 2d 598, 109 S.Ct. 2702 (1989). However, in addition to the clear warning in *Patterson* that no "unnecessary overlap" should occur between § 1981 claims and Title VII claims, the Supreme Court in *Jett* did not have before it the issue whether to apply § 1981 to post-contract formation conduct since it was not raised or discussed in the lower courts.

Petitioner also seeks to avoid application of *Patterson* to this case by contending *Patterson* should constitute an exception to the general rule that new judge-made law be given retroactive effect. *See Robinson* v. *Neal*, 409 U.S. 505, 35 L.Ed.2d 29, 93 S.Ct. 876 (1973). In order to establish an exception to

this rule, the criteria set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971) must be used. The criteria as articulated in *Huson*, are as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, . . . we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. ". . . Finally, we have weighed the inequity imposed by retroactive application, for [w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our bases for avoiding the 'injustice or hardship' by a holding or nonretroactivity."

404 U.S. 106-07 (citations omitted).

In this case, the *Patterson* rule does create a new principle of law, because prior to *Patterson*, § 1981 was generally considered coextensive with Title VII, which allowed redress for discriminatory discharge. *See generally*, *Stallworth* v. *Shuler*, 777 F.2d 1431 (11th Cir. 1985) (§ 1981 is as broad as Title VII). In *Patterson*, the Supreme Court decided that § 1981 should not be as extensive as Title VII and urged that construction of § 1981 occur so as to avoid such overlap.

Although *Patterson* created new law, it nonetheless must be given retroactive effect because doing so would further the purpose of *Patterson* without producing substantial inequitable results. The purpose of *Patterson* was to restrict § 1981 claims to claims the Supreme Court has determined carry out the congressional intent and in a way that will not conflict with Title VII. Thus, the second *Chevron* factor clearly favors retroactive application of *Patterson*.

In turning to the third *Chevron* factor, it is clear that substantial inequities will not occur in this case if *Patterson* is applied retroactively. As stated previously, petitioner has already been awarded reinstatement and paid back pay and benefits in the amount of $235,667.27. Thus, no substantial inequity will result to petitioner since he has already received that to which he was entitled under the only proper claim, Title VII.

The majority of courts considering the question of whether *Patterson* should be applied retroactively have concluded it should. *See, e.g., Morgan* v. *Kansas City Area Trans. Authority*, 720 F.Supp. 758 (W.D. Mo. 1989) (citing cases), *Williams* v. *National Railroad Passenger Corp.*, 716 F.Supp. 49 (D.C. Col. 1989); *Brackshaw* v. *Miles, Inc.*, 723 F. Supp. 60 (E.D. Ill. 1989). In fact, in a very recent Fifth Circuit Court of Appeals case, the Fifth Circuit applied *Patterson* retroactively even after a jury verdict had been awarded, and vacated the portion of damages attributable to the § 1981 action. *Carroll* v. *General Accident Ins. Co.*, 891 F.2d 1174 (5th Cir. 1990).

Although petitioner cites to the case of *Gillespie* v. *First Interstate Bank*, 717 F.Supp. 649 (E.D. Wisc. 1989) for the proposition *Patterson* should not be applied retroactively, that decision is clearly in the minority and is also not applicable herein. In *Gillespie*, a verdict had been rendered for appellant. No such situation exists herein. Petitioner bore the burden of proof that he was entitled to compensatory damages above the $235,667.27 in back pay and benefits already paid and also bore the burden of proof that the requisite intent necessary to obtain punitive damages. Moreover, as evident by the Fifth Circuit case of *Carroll*, *supra*, even where a verdict is rendered, *Patterson* can still apply retroactively. To do otherwise would thwart the purpose of § 1981 as enunciated by the Supreme Court in *Patterson*.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING PETITIONER'S MOTION TO AMEND HIS COMPLAINT TO CHALLENGE THE ARBITRATION WHEN SUCH AMENDMENT WOULD INJECT AN ENTIRELY NEW ISSUE ON WHICH NO DISCOVERY HAD BEEN CONDUCTED SOME SIX YEARS AFTER THE ARBITRATION, ESPECIALLY SINCE HE PREVAILED IN STATE COURT.

After the trial court granted respondent's motion for summary judgment, petitioner moved to file a third amended complaint. He sought in this proposed amended complaint to allege for the first time that the 1983 arbitration was tainted, in violation of his contract rights as now defined in *Patterson*. The trial court did not abuse its discretion in overruling petitioner's untimely motion.

The first complaint in this case was filed on March 18, 1985. Later, on March 27, 1989, petitioner filed an amended complaint. The only allegation in either complaint was his claim he was discriminatorily discharged. The complaints were absolutely void of any reference to the underlying arbitration. After almost five years of litigation, and through two depositions of petitioner, he raised for the first time in the proposed amended complaint an allegation that the 1983 arbitration held pursuant to the collective bargaining agreement was tainted and constituted a violation of his right to contract.

In determining whether leave to amend should be granted, the factors set forth in *Forman* v. *Davis*, 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962), must be considered:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory

> motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be "freely given."

Analysis of petitioner's new claim in light of the *Forman* factors leads to the conclusion leave to amend was properly denied. As the trial court found, petitioner unduly delayed presenting this new claim and allowing it would unduly prejudice respondent. This finding should not be disturbed absent a showing the trial court abused its discretion.

At no time did petitioner offer any explanation for his delay of almost five years from the date of suit and almost six years from the date of the arbitration for his delay. The witnesses he now claims were somehow, albeit unspecified, threatened, were all witnesses known to him at the time of the arbitration, and, in fact, testified for him at that time and before the OCRC. Neither petitioner's union steward nor his union attorney attest to any knowledge of any retaliatory threats by respondent. The absence of an explanation for this delay is grounds in and of itself to deny the motion for leave to amend. *Freeman* v. *Continental Gas Co.*, 381 F.2d 459 (5th Cir. 1967); *Isaac* v. *Harvard University*, 769 F.2d 817 (1st Cir. 1985).

Moreover, the trial court's review of the proffered affidavits in support of petitioner's motion should also be undisturbed as it found the affidavits to be "quite thin." The allegations were unspecific, general conclusions without any factual support. In fact, the record before the trial court established that five of petitioner's coworkers did testify in his favor at both the arbitration and the OCRC hearing, and no affidavit stated any retaliation against these employees occurred.

Prejudice to respondent would be great. Since the arbitra-

tion process was never an issue in this case, respondent did no discovery as to what occurred at the arbitration. It never had reason to depose the employees involved, the arbitrators, including the independent chairman, the attorneys involved, or the union steward. With over six years having passed by since 1983 arbitration, it is extremely unlikely independent recollections exist.

Other considerations also are against petitioner's motion for leave to amend the complaint. He failed to appeal the arbitration finding against him. However, he did ultimately prevail in the Ohio courts, and obtained reinstatement and back pay, which rendered the arbitration moot. He also failed to assert this claim the last time he amended his complaint in March of 1989.

Moreover, the proposed amendment to add the claim the arbitration was tainted is barred by the statute of limitations. The adverse arbitration decision was issued on August 18, 1983. Under the one year statute of limitations, the action is time barred. *Mulligan* v. *Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 2902 (1986). If the longer six year statute is applied, the statute ran five days before petitioner moved to amend his complaint.

While petitioner may claim the new allegation should relate back, this contention should be rejected. The question as to whether the arbitration process was impermissibly tainted arose not from petitioner's discharge, but rather from the collective bargaining contract. It involves determining whether the company *and* the union complied with the contract provisions governing arbitration. This question stands independent from whether petitioner was discharged for racial reasons.

Since the issue of the adequacy of the arbitration process was never raised in the case, no discovery was ever conducted on this new claim. In the years that have passed by, respondent never interviewed or deposed any of those involved in the arbitration, such as the chairman, because there was no

complaint about the arbitration process. This lack of identity between the original complaints and the proffered amendment and the lack of any notice precludes the relation back of the second amended complaint. *See U.S.* v. *Templeton*, 199 F.Supp. 179 (D.C. Tenn. 1961). Lack of notice alone can defeat a demand that a claim relate back. *Minnesota Chippewa Tribe* v. *U.S.*, 768 F.2d 338 (C.A. Fed. 1985); *SEC* v. *Seaboard Corp.*, 677 F.2d 1301, 1314 (9th Cir. 1982). This rule promotes the objective of a statute of limitations, which is to protect persons from the necessity of defending stale claims. *Hockett* v. *American Airlines, Inc.*, 357 F.Supp. 1343 (D.C. Ill. 1973).

In addition to these substantive and procedural barriers to petitioner's proposed amendment, petitioner also ignores the realities of his case. While he asserts his § 1981 claim should survive because DP&L impaired his ability to enforce through legal process his contract rights, he ignores the fact that through the very legal processes he employed he prevailed.

In *Patterson* v. *McLean Credit Union*, 491 U.S. ____, 105 L.Ed. 2d 132, 151 (June 15, 1989), the Supreme Court discussed the right to enforce contracts guarantee embodied in § 1981. The court stated that this guarantee "embraces protection of a legal process, and of a right to access to legal process, that will address and resolve contract law claims without regard to race." *Id.* In this case, petitioner had the same access to the legal process as enjoyed by white citizens. He had a hearing before the OCRC, where he prevailed, and had a hearing before the Ohio Supreme Court, which reinstated the hearing officer's decision. To accept petitioner's argument that his enforcement rights were impaired because he lost the arbitration ignores the judicial process he successfully employed and would create expanded liability on employers. Employers would become subject to § 1981 suits if they participated and won in an arbitration process, even when the ultimate result was against the employer. The legal process contemplated by the court in *Patterson* was not interim, ultimately nonbinding processes, but controlling, binding legal processes.

CONCLUSION

For all of the reasons set forth above, The Dayton Power & Light Company asks that Mr. Prather's petition be denied.

Respectfully submitted,

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APPENDIX

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-2 or 2000e-3].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commisison. If the Commission determines after such investigation that there is

not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public informaiton in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, pro-

vided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officals and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State of local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment

practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, government agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or

political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government,

governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending a final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.] Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) **Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.** If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

(h) **Provisions of 29 USCS §§ 101 et seq. not applicable to civil actions for prevention of unlawful practices.** The provisions of the Act entitled "An Act to amend the Judicial Code

and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) **Proceedings by Commission to compel compliance with judicial orders.** In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) **Appeals.** Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28 United States Code.

(k) **Attorney's fee, liability of Commission and United States for costs.** In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.